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No. 01-

IN THE

Supreme Court of the United States

CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE WILL OF LOUISE C. CHAPLIN; CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE LOUISE D. CATHERWOOD TRUST; AND GORDON W. CHAPLIN, INDIVIDUAL TRUSTEE OF THE JESSICA D. CATHERWOOD TRUST,

Petitioners,

v.

NAVIGANT CONSULTING, INC.; POLICEMEN AND FIREMEN RETIREMENT SYSTEM OF THE CITY OF DETROIT; *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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February 15, 2002

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QUESTIONS PRESENTED

1. Can class members who are not named parties to a class action appeal the district court's rejection of their objections to a settlement, properly presented in response to notice required by Rule 23 of the Federal Rules of Civil Procedure, without going through an intervention proceeding to redesignate them as named parties?

(*This question is presently before the Court in the granted case of* Devlin *v.* Scardelletti, *No. 01-417, oral argument scheduled for March 26, 2002.)*

2. If such class members are required to intervene and be redesignated as named parties in order to appeal, should the requirement be any more onerous than a *pro forma* post-judgment intervention pursuant to an unconditional right to intervene?

PARTIES TO THE PROCEEDING

Respondents in this Court are the defendants in the consolidated proceedings below who participated in proceedings for approval of the settlement in the District Court or in the appeal below (Navigant Consulting, Inc., Charles A. Demirjian, Stephen J. Denari, and Robert P. Maher), and the plaintiffs in the consolidated proceedings below (represented by Policemen and Firemen Retirement System of the City of Detroit, appointed Lead Plaintiff).

The case below was a consolidation of 22 separate actions all filed in the United States District Court for the Northern District of Illinois. Listed in order of case number in the district court, they were:

Stearns v. Navigant Consulting, Inc., et al., Case No. 99-CV-7617

Friedman v. Navigant Consulting, Inc., et al., Case No. 99-CV-7633

Levitin v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7664

Bell v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7668

Greb v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7669

Piven v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7674

Ladig v. Navigant Consulting, Inc., et al., Case No. 99-CV-7684

Applebaum v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7686

Crown Holdings Corp. v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7754

Mulvihill v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7836

Morrison v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7868

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Abdullah v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7970

Mirsky v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7984

Klar v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-8020

Martin v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-8162

Pasternak v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-8187

McGuire v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-8207

Cleenput v. *Navigant Consulting, Inc., et al.*, Case No. 00-CV-126

Neumann v. *Navigant Consulting, Inc., et al.*, Case No. 00-CV-379

Amin, et al. v. *Navigant Consulting, Inc., et al.*, Case No. 00-CV-448

Messemer v. *Navigant Consulting, Inc., et al.*, Case No. 00-CV-7235

In addition, Charles L. Grimes individually filed a similar action against Navigant Consulting, Inc., on behalf of himself and all others similarly situated, that was not consolidated with the cases below.

Named as plaintiffs in the various consolidated cases were:

Shaheen Mandil Abdullah, on behalf of himself and all others similarly situated

Joseph Amin

Milton and Roslyn Applebaum, on behalf of themselves and all others similarly situated

Arthur L. Bell and Meredith M. Bell, on behalf of themselves and all others similarly situated

Joseph Boodaie and Mojgan Boodaie

Jack Cleenput, on behalf of himself and all others similarly situated

Crown Holdings Corp., on behalf of itself and all others similarly situated

Stephen Friedman, on behalf of himself and all others similarly situated

Mitchell Greb, on behalf of himself and all others similarly situated

Ed Klar, on behalf of himself and all others similarly situated

Don Ladig, on behalf of himself and all others similarly situated

Raizy Levitin, on behalf of herself and all others similarly situated

Emery A. Martin, on behalf of himself and all others similarly situated

Frank McGuire, on behalf of himself and all others similarly situated

Glenn M. Messemer, on behalf of himself and all others similarly situated

Irving Mirsky, on behalf of himself and all others similarly situated

Todd Morrison, on behalf of himself and all others similarly situated

John Mulvihill, on behalf of himself and all others similarly situated

Erwin Neumann, on behalf of himself and all others similarly situated

Alvin Pasternak, on behalf of himself and all others similarly situated

Katherine K. Piven, on behalf of herself and all others similarly situated

Malcolm Rosenwald FBO Malcolm Rosenwald IRA, individually and on behalf of all others similarly situated

Peter C. Stearns, on behalf of himself and all others similarly situated

Named as defendants in one or more cases were:

Navigant Consulting, Inc.

Barry S. Cain

Charles A. Demirjian

Stephen J. Denari

Timothy D. Kingsbury

Robert P. Maher

A third-party plaintiff in one or more cases was:

Navigant Consulting, Inc.

A third-party defendant in one or more cases was:

Federal Insurance Company

An intervenor in one or more cases was:

Genesis Insurance Co.

Objectors to the settlement of the consolidated action were:

Stephen J. Denari

Charles A. Demirjian

Robert P. Maher

Charles L. Grimes and Gordon W. Chaplin, Trustees Under the Will of Louise C. Chaplin

Charles L. Grimes and Gordon W. Chaplin, Trustees Under the Louise D. Catherwood Trust

Gordon W. Chaplin, Individual Trustee of the Jessica D. Catherwood Trust

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PETITION FOR CERTIORARI

Charles L. Grimes *et al.* respectfully petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

I. PRELIMINARY

A. Reports of Opinions and Orders in the Case

The relevant decisions and orders of the court of first instance, the United States District Court for the Northern District of Illinois, are an unreported oral opinion denying petitioners' motion to intervene, App. 13a, and the associated minute order. App. 16a. The opinion of the Seventh Circuit on appeal is reported at 275 F.3d 616 (7th Cir. 2001), and is reprinted at App. 1a. The associated order of the Seventh Circuit, review of which is sought, is reprinted at App. 8a.

B. Basis for Jurisdiction in This Court

The judgment sought to be reviewed was entered on December 26, 2001. App. 8a. This Court has jurisdiction to review it on a writ of certiorari under 28 U.S.C § 1254(1).

C. Statutes and Rules of Court Involved in the Case

Statutes and rules of court of particular significance to this case are FED. R. APP. P. ("FRAP") 3; FED. R. CIV. P. 23(e) and 24; and portions of the Private Securities Litigation Reform Act of 1995 ("PSLRA") dealing with class notice, 15 U.S.C. § 78u-4(a)(7). They are reprinted in Appendix H, beginning at App.17a.

II. STATEMENT OF THE CASE

A. Jurisdiction in the Court of First Instance

The court of first instance, the United States District Court for the Northern District of Illinois, had jurisdiction under 28 U.S.C. § 1331, in that the actions arose under §§ 10(b), 20(a), and 27 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78(a), 78(b), and 78aa.

B. Events Before the Opinion Below

1. Petitioners are shareholders in respondent Navigant Consulting, Inc., a Delaware corporation with headquarters in Chicago. They purchased stock in Navigant both during and after the "Class Period" discussed *infra*. Beginning in November 1999, a number of substantially identical class action complaints — totaling 22 in all[1] — alleging violations of the federal securities laws were filed against Navigant and other defendants in the Northern District of Illinois. These actions were subsequently consolidated.

The gravamen of the consolidated action was the charge that Navigant had misstated its financial results for the first three quarters of 1999, thereby artificially inflating the market prices of its common stock and call options and thus causing damage to Navigant shareholders. This was allegedly accomplished by the use of an accounting method called the pooling of interest method, as opposed to one called the purchase method, with respect to certain

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[1] The opinion below says there were 21 consolidated actions, App. 3a, but this is erroneous.

acquisitions of other companies during the first quarter of 1999. The technical specifics of these methods are not material for present purposes; suffice it to say that the pooling of interest method produces[2] significantly higher apparent revenue and income than does the purchase method, and that its use was improper if certain transactions took place within six months of the relevant acquisitions. Such a transaction — compounded by a press release falsely describing it — did take place in July 1999, well within the six-month period.

Nevertheless, during the first three quarters of 1999 Navigant issued press releases and filed documents with the SEC reporting its financial results using the pooling of interest method. Not until November 22, 1999, after filing a third-quarter 10-Q with the SEC that continued to use the pooling of interests method, did Navigant issue a press release stating that its accounting method "*may* have been *inappropriate*" (emphasis added); not until January 24, 2000, did Navigant issue a press release disclosing that its Board had instructed management to restate financial statements to account correctly for the relevant acquisitions — thereby reducing Navigant's previously reported income by 36%.

2. In addition to the consolidated actions, petitioner Grimes in his individual capacity, on behalf of himself and all others similarly situated, filed in September of 2000 an action against Navigant in the United States District Court for the District of

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[2] Or produced; it has been abolished by the Financial Standards Accounting Board for transactions after mid-2001. App. 3a–4a.

Delaware. This was transferred to the Northern District of Illinois, but was not consolidated with the other 22 actions and was assigned to a different judge of that court.[3]

3. After consolidation of the 22 actions, pursuant to the PSLRA the district court appointed as lead plaintiff respondent Policemen and Firemen Retirement System of the City of Detroit (a shareholder that had not itself filed an action and all of whose purchases of Navigant stock had been made between May 6 and November 19, 1999, well within the class period as ultimately defined in the settlement agreement); together with two law firms as lead counsel, one of which was nearly disqualified for professional improprieties in its efforts to get appointed to that position. *Stearns* v. *Navigant Consulting, Inc.*, 89 F. Supp. 2d 1014 (N.D. Ill. 2000).

On December 1, 2000, a settlement notice pursuant to FED R. CIV. P. 23(e) was sent out to class members, advising that the Navigant defendants and this appointed lead plaintiff had entered into a settlement deal on September 22. Among other things, the settlement provided for damages only with respect to stock purchased during a Class Period defined as January 1, 1999, to November 19, 1999 (the last business day before the press release that said the company's accounting method "*may* have been *inappropriate*" (emphasis added)); the class being defined as persons who had purchased stock during

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[3] The opinion below says that Grimes "sought to have this twenty-second suit consolidated with those already under way. The district court denied this motion." App. 5a. This is erroneous. Grimes did not seek consolidation and he filed no such motion.

that Class Period. Any class member wishing to share in the settlement was required to release all claims with respect to any statement, misrepresentation, or omission made during the Class Period – which covered all the relevant statements, misrepresentations, and omissions.

The settlement thus took care of the lead plaintiff, but afforded no relief to other class members such as petitioners with respect to stock purchases made after November 19, 1999, but before January 24, 2000, the date of the crucial announcement confirming that the accounting method had in truth been wrongful and directing restatement of financial statements. Moreover, representations by lead counsel as to the company's financial situation made it plain that a stockholder opting out of the settlement had little prospect of any recovery at all.

4. The petitioners duly and timely filed objections to the settlement pursuant to the notice, contending (a) that excluding purchases of stock during the November-January period unfairly rewarded class members such as the lead plaintiff at the expense of others such as petitioners, and (b) that the notice failed to comply with the PSLRA, in that the fees sought by lead counsel were greater than the amount set forth in the notice. The district court rejected these objections without written opinion, and on March 22, 2001, entered orders approving the settlement as fair, reasonable, and adequate, and awarding the full amount of fees sought by lead counsel.

5. On April 12, petitioners filed a notice of appeal of these orders of March 22 to the court below. On April 24 the court below issued an order that noted (a)

that the March 22 orders did not appear to be final appealable judgments because a third-party complaint filed by Navigant against an insurer was still pending, and (b) that petitioners appeared not to have standing to appeal, since they had not intervened as named parties in the district court action. The order directed petitioners either to file a brief setting forth the reasons why the appeal should not be dismissed for lack of jurisdiction, or to move for voluntary dismissal of the appeal. App. 10a.

The first ground of objection was cured by an order of May 3 in the district court, certifying the March 22 orders as final judgments pursuant to FED. R. CIV. P. 54(b). App. 11a. As to the second objection, counsel had been unaware that the Seventh Circuit, unlike their home circuit the Third, does not allow unsuccessful objectors to appeal unless they have first intervened and become named parties in the district court. *Compare Felzen* v. *Andreas*, 134 F.3d 873 (7th Cir. 1998), *aff'd by an equally divided court sub nom. California Public Employees' Retirement System* v. *Felzen*, 525 U.S. 315 (1999) (intervention required), *with Carlough* v. *AmChem Products, Inc.*, 5 F.3d 707, 710 (3d Cir. 1993) (intervention unnecessary). They accordingly moved on May 4 for voluntary dismissal of their initial appeal (dismissal order entered May 8, App. 12a), and returned to the district court that same day with a motion to intervene solely in order to appeal. That motion was denied on May 9, App. 13a, with an oral opinion (*sub nom. Stearns* v. *Navigant Consulting, Inc.)* that it was untimely because "if you are planning to appeal any ruling, and you never know how the rulings are going to go, you need to intervene at the earliest opportunity in order to take an appeal

at some point," and on the ground that delay in, and complication of, settlement distribution constituted prejudice to Navigant and the class members. (The opinion did not consider any countervailing prejudice to petitioners.) App. 13a–14a.

6. Petitioners, by a notice of appeal filed on May 22, then appealed to the court below the district court denial of their motion to intervene, together with a conditional appeal of the orders of March 22, now certified as final judgments. On December 26, 2001, the court below affirmed denial of the motion to intervene, and dismissed for want of jurisdiction the conditional appeal from the orders approving the settlement, with an opinion by Judge Easterbrook. App. 7a.

C. The Opinion Below

The court first emphasized that it adhered to its view, enunciated in *Felzen*, *supra*, that because of references to "parties" in FRAP 3, and this Court's decision in *Marino* v. *Ortiz*, 484 U.S. 301 (1988) (per curiam) (non-class-member non-parties could not appeal a judgment in a class action), "[o]nly parties may appeal from judgments entered in federal litigation," and "[b]ecause members of a class (other than the named representatives) are not automatically parties, they must intervene and acquire party status if they wish to appeal." App. 1a–2a. Petitioners had suggested that the court overrule *Felzen*, but "[t]hat decision," said the court, "is not a candidate for reconsideration. . . . The ball is in another Court" — *viz.*, this Court, in *Devlin* v. *Scardelletti*, No. 01-417. "That is the right forum for further debate." App. 5a.

"Still," said Judge Easterbrook, "we cannot resist a few comments"; and the opinion went on to make it clear that the Seventh Circuit, unlike other circuits, based its reasoning not on "policymaking by judges" concerning "sound practice," nor on notions of "whether class members have 'standing' to appeal," but on the "more formal position" that "[a]ppellate Rule 3 limits appeals to parties, and . . . [c]lass members (other than the representatives) are not parties . . . ." App. 5a–6a

Intervention, said the opinion, reduces uncertainty and facilitates discovery, and accordingly "we insist that timely requests to intervene be freely granted." App. 7a. But the opinion made it clear that by "timely" it meant that "delay must be measured from the time the would-be intervenors learned (or should have known) of the representative's shortcomings," quoting from *Crawford* v. *Equifax Payment Services, Inc.*, 201 F.3d 877, 880 (7th Cir. 2000) (internal quotes omitted); that "[e]verything depends on the gap between the need for action and the taking of action." App. 2a.

In the instant case, it said, petitioners "probably should have intervened before the settlement was negotiated," App. 3a, *viz.*, back in August 2000, when, said the opinion, they "knew that the damages period proposed by the class representatives would close in November 1999, omitting some of their trades." App. 4a. Accordingly, "the district judge acted within his discretion in finding" that the motion for intervention was too late. App. 5a. The order denying the motion to intervene was therefore affirmed, and the conditional appeal from the orders approving the

settlement and awarding fees was dismissed for want of jurisdiction. App. 8a.

III. REASONS FOR ALLOWANCE OF THE WRIT

A. The Petition Should Be Granted as to the First Question Presented Because It Raises the Identical Issue as to Which This Court Has Already Granted a Petition for Certiorari in *Devlin* v. *Scardelletti*, No. 01-417.

The first question presented is one on which the circuits are irreconcilably split, and is the same question (phrased slightly differently) as is presented in *Devlin* v. *Scardelletti*, No. 01-417, in which a petition for certiorari was granted on December 10, 2001. Petitioners respectfully suggest that this in itself is fully sufficient reason for allowance of the writ in this case.

Petitioners also respectfully refer the Court to the brief filed by these petitioners as *amici curiae* in *Devlin*.

B. The Petition Should Be Granted as to the Second Question Presented, Because If This Court Decides That Intervention Is Necessary in Order To Appeal, the Lower Courts Should Have Clear Guidance as to the Applicable Requirements.

(We have stated this as a separate question out of an abundance of caution, although we believe it to be "fairly included," Rule 14.1(a), in the first question.)

If nevertheless the Court should conclude that intervention is necessary in order for a class member

to appeal rejection of objections to a settlement, the lower courts will need guidance in applying such a rule. The approach taken by the court below cannot be squared either with the clearly enunciated policy of Congress or with this Court's holding in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977).

1. Even If Intervention Is Deemed Necessary, No More Should Be Required Than a *Pro Forma* Post-Judgment Intervention As of Unconditional Right With Minimum Paperwork.

The potential for corruption in class action settlements (and the related field of derivative action settlements) has long been recognized. Once the settlement deal is cut, there are no longer adversaries before the court; the named parties have every incentive to defend the deal and none whatever to question it. (And realism compels recognition that the court itself will often be predisposed to see a case disposed of by settlement.) "Once a settlement is agreed, the attorneys for the plaintiff shareholders link arms with their former adversaries to defend their joint handiwork. . . . All the dynamics conduce to judicial approval of such settlements." *Alleghany Corp.* v. *Kirby*, 333 F.2d 327, 347 (2d Cir. 1964), *aff'd en banc by an equally divided court*, 340 F.2d 311 (2d Cir. 1965), *cert. dismissed*, 384 U.S. 28 (1966) (Friendly, J., dissenting.) "In assessing settlements of representative actions, judges no longer have the full benefit of the adversarial process. . . . In seeking court approval of their settlement proposal, plaintiffs' attorneys and defendants' interests coalesce and mutual interest may result in mutual indulgence. The

parties can be expected to spotlight the proposal's strengths and slight its defects." *Bell Atlantic Corp.* v. *Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993) (citations omitted).

For this reason, FED R. CIV. P. 23(e) requires that unnamed class members be given notice of any proposed settlement so they can have a fair opportunity to object. "In such circumstances, objectors play an important role by giving courts access to information on a settlement's merits." *Ibid.*

By the beginning of the 1990s, class action settlements had become a scandal. "Much like the production of sausage and legislation," Professor John C. Coffee, Jr., of Columbia Law School wrote in 1991, "the settlement of securities litigation is a process that the high-minded are best advised not to examine too closely." Coffee, *Suspect Settlements in Securities Litigation*, New York Law Journal, March 28, 1991, at 5 col. 1. Professional journals,[4] the general press,[5] and

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[4] *E.g.*, Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 714-20 (1986); Coffee, *The Unfaithful Champion: The Plaintiff As Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5, 26-33 (Summer 1985); Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 232-33, 239-46 (1983).

[5] *E.g.*, Lambert, *Public Interest Law Group Fights Some Class Settlements as Unfair*, WALL ST. JOURNAL, August 17, 1995, at B4; Coffee, *The Corruption of the Class Action*, WALL ST. JOURNAL, Sept. 7, 1994, at A15; *Millions for Us, Pennies for You*, NEW YORK TIMES, December 19, 1993, Section 3, at 1; *Coupon Clipping for Lawyers*, WALL STREET JOURNAL, November 18, 1993, at A20 col. 1; Baron, *An Asbestos Settlement With a Hidden*

the Chairman of the SEC,[6] all weighed in with their concern. ("[W]e have a hard time believing the lawyers deserve their money for producing a settlement in which all the real money goes to the lawyers," said the *Wall Street Journal*. "Funny, we thought the justice system was supposed to have something to do with, well, justice." *Coupon Clipping for Lawyers, supra* n.5.)[7]

Congress took note of the scandal, and after several years of hearings and investigations it enacted the PSLRA for class actions under the securities laws.

Agenda, WALL ST. JOURNAL, May 6, 1993, at A11, col. 3; Moses, *Off to Court: Lawyer Given To Filing Shareholder Lawsuits Comes Under Scrutiny*, WALL ST. JOURNAL, October 28, 1992, at 1, col. 8; Burton, *The Litigator: How Stanley Chesley Settles Things Quickly in Mass-Injury Suits: Class-Action Attorney Earns Big Fees in Settlements Some Say Are Premature*, WALL ST. JOURNAL, June 26, 1992, at 1, col. 1.

[6] "[V]irtually all securities class actions are settled for some fraction of the claimed damages, and some allege that settlements often fail to reflect the underlying merits of the cases." Remarks by Chairman, Arthur Leavitt ... Securities Regulation Institute, U. of Calif. San Diego, January 26, 1994, at 3, 6.

[7] Public concern over class action abuses continues to this day. See *Lerach's Enron Gambit*, WALL ST. JOURNAL, February 6, 2002, at 18 col. 1 ("'I have the greatest practice of law in the world,' Mr. Lerach once quipped to a group of corporate directors. 'I have no clients.'"); *Milberg Weiss Faces Inquiry, Report Says*, NEW YORK TIMES, January 26, 2002, at C3 col. 8 (reporting a federal grand jury investigation into whether a leading class-action law firm paid plaintiffs to take part in investor suits); *In a Class of His Own: How Melvyn Weiss, a Class Action Lawyer, Finds Crimes That Pay*, THE ECONOMIST, January 19, 2002, at 56 ("a lawyer could now seek out an injustice and then troll for clients who could give him access to the court — plus a big slice of any settlement").

Pub. L. 104-67, 109 STAT. 737, 15 U.S.C. § 77u. Among other provisions, the PSLRA seeks to eliminate "professional lead plaintiffs" (and their professional lead lawyers and the attendant races to the courthouse) by providing for a court-selected lead plaintiff who in turn chooses lead counsel; cuts down on "fishing expedition" lawsuits; and, most significantly for the instant issue, requires extensive detail in settlement notices, including a statement of the recovery agreed on, a statement of the potential recovery, a statement and explanation of attorneys' fees to be sought, and a statement of the reasons for proposing the settlement. 15 U.S.C. § 77u-1(a)(7).

The reason for this last provision is obvious: to make it easier for class members to evaluate the proposed settlement so as to enable them to object if they feel they should do so. Thus, the conference committee quoted the testimony of a class member in two separate securities fraud lawsuits: "I feel that the settlement offer should have told the stockholders how little of their losses will be recovered in the settlement, and that this is a material fact to the shareholder's *decision to approve or disapprove the settlement*." H.R. Conf. Rep. No. 104-369, 104th Cong., 1st Sess. at 36 (1995) (emphasis added).

In other words, the PSLRA reconfirms, through provisions that transcend the merely procedural and in effect impose substantive limits, that it is the public policy of the United States to facilitate a searching examination of class action settlements; to impose what Judge Friendly in *Alleghany*, *supra*, called "a high standard with respect to disclosure at settlement hearings," subjecting arguments in favor of the

settlement "to a most icy scrutiny." 333 F.2d at 347. And though the PSLRA itself deals only with securities cases, identical policy considerations apply to all class actions. See the proposed revisions to Rule 23(e) to strengthen the settlement review and approval process, with extensive discussion, in Report of the Civil Rules Advisory Committee, May 14, 2001, as revised July 31, 2001, http://www.uscourts.gov/rules/comment2002/8-01CV.pdf, at 51-69.

Scrutiny at least as icy should be accorded to erection of obstacles, unrelated to the merits, to efforts by class members — whose rights, after all, will be determined and possibly cut off forever — to bring before the courts, both trial and appellate, perceived ways in which the settlement is not fair, reasonable, and adequate.

Foremost among these obstacles would be requiring formal intervention under FED. R. CIV. P. 24. It is expensive. It is burdened by elaborate paperwork, including the drafting of a separate complaint and the preparation of motions and briefs. It is hedged about with technicalities, such as having to litigate under Rule 24 such issues as timeliness and the adequacy of existing representation (an issue which has presumably already been addressed at the class certification stage, and presumably determined in the representative's favor), and opening up automatic disclosure under FED. R. CIV. P. 26(a). The only significant countervailing benefit posited by the opinion below is the ability to take discovery; but the participants already have that right in a properly managed fairness hearing. See 2 NEWBERG AND

CONTE, NEWBERG ON CLASS ACTIONS § 11.57 (3d ed. 1992).

As noted *infra*, the approach taken in the opinion below would often force class members to go through this process long before they even know whether they will wish to object. None of it has any relation to the merits of the settlement — which is all the objecting class member has any interest in.

And that is all the appellate courts should be interested in. Their role in examining class action settlements is vital. "Because a district court may overlook a 'mutual indulgence' [quoted from *Bell Atlantic Corp.* v. *Bolger*, *supra*], appellate review advances the policy of assuring the fairness to shareholders that underlies the requirement of court approval." *Kaplan* v. *Rand*, 192 F.3d 60, 67 (2d Cir. 1999) (derivative suit). "Th[e] unique relationship among plaintiffs' counsel, plaintiffs, and defendants in class actions imposes a special responsibility upon appellate courts to hear challenges to fee awards by class members whose claims may have been reduced or in some way affected in exchange for large fee awards." *In re Cendant Corporation PRIDES Litigation*, 243 F.3d 722, 728 (3d Cir. 2001).

Requiring objectors to intervene in order to appeal will not cut down on the number of appeals; it will just mean that courts of appeal will be faced with appeals from denials of intervention in addition to appeals from denials of objections. The primary issue will then be whether it was an abuse of discretion to deny intervention, not whether the settlement was fair, reasonable, and adequate to the class as a whole. As a Justice pointed out at oral argument in *Felzen*, there

would then be "no sure right of review other than on the abuse of discretion standard." Transcript of Oral Argument in *California Public Employees' Retirement System* v. *Felzen*, No. 97-1732, at 52. In the real world, as a Justice pointed out at oral argument in *Felzen*, district judges are going to look at the objections. If they do not like them, they are likely to deny intervention. *Id.* at 42. But the key question of fairness of the settlement will then be reviewed by the court of appeals only after having to deal with "14 other issues that could be crafted out of Rule 24." *Id.* at 44. Appellate courts should not allow trial courts to be their gatekeepers in this fashion.

The instant case affords a good example. In their objections, petitioners pointed out a square violation of the PSLRA's requirement that the settlement notice specify the amount of fees and costs class counsel would seek. 15 U.S.C. § 78u-4(a)(7). The district court's disregard of this plain requirement cried out for appellate correction; that is what a circuit court's job description is all about. (And awareness of this is a powerful incentive for district courts to be careful.) Instead, the court below entered into a lengthy dissertation on the principles of "timeliness" under Rule 24.

Consistent with clear policy, if intervention in order for objectors to appeal is required at all, it should be available as a matter of absolute right with a minimum of paperwork. And it should be deemed timely if sought within the 30 days after final judgment allowed for appeal. This last point has already been decided by this Court, in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977).

2. The Decision of the Court Below as to This Issue Conflicts With This Court's Decision in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977).

The court below gave lip-service to the policy of close scrutiny of class action settlements, saying that "it is vital that district courts use [intervention by objectors] to promote vindication of the class members' rights; that's why we insist that timely requests to intervene be freely granted." App. 7a. But what it seemed to give with one hand it took away with the other, by an extreme interpretation of what is "timely." To be "timely," it in effect held, a class member must move to intervene at the earliest moment he may suspect (or at the earliest moment a court may after the fact think he should have suspected) that a potential settlement will not be to his liking — even though the offending provision might never be included in the settlement, and even though the settlement itself might never be reached after all. App. 3a. This is simply contrary to *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), in which this Court recognized the wastefulness of forcing premature intervention by a potential appellant, and held that a motion to intervene in order to appeal is timely if brought within the 30-day period for filing a notice of appeal under FRAP 4(a).

In *United Airlines*, the district court declined to certify a class in a case brought as a class action. Such an order was not immediately appealable as of right in the relevant circuit (the Seventh). After an unsuccessful effort at interlocutory appeal under 28 U.S.C. § 1292(b), the named plaintiffs continued their

action on an individual basis. In due course they prevailed on the merits and the defendant agreed to pay determined amounts of back pay; and, three years after the denial of class certification, a final judgment was entered in the case. Within the 30-day deadline for appealing under FRAP 4(a), McDonald, an unnamed class member, moved to intervene to appeal the denial of class certification.[8]

This Court held that McDonald's motion to intervene should have been granted, because it was filed within the 30-day period for appealing the final judgment — as against the contention that she should have moved to intervene promptly after the class certification denial three years before. It rejected the argument — which is the approach adopted in the instant case by the court below — that intervention should be required at the earliest date when the intervenor might have sensed some potential deficiency in a possible settlement: for such a rule, it pointed out, could make the intervenor "a superfluous spectator in the litigation" until such time as a final appealable order is entered, and "would induce putative class members to file protective motions to intervene .... The result would be the very multiplicity of activity which Rule 23 was designed to avoid." 432 U.S at 394 n.15 (citations and internal quotes omitted). Rather, it said, "[t]he critical fact here is that *once the entry of final judgment made the adverse class determination appealable*, the respondent quickly sought to enter the litigation." 432 U.S. at 394 (emphasis added).

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[8] The issue of whether intervention was necessary in order to appeal was not raised in the case.

> "The critical inquiry in every such case is whether in view of all the circumstances the intervenor acted *promptly after the entry of final judgment*. *Cf. NAACP* v. *New York*, 413 U.S. 345, 366. Here, the respondent filed her motion *within the time period within which the named plaintiffs could have taken an appeal*. We therefore conclude that the Court of Appeals was correct in ruling that the respondent's motion to intervene was timely filed and should have been granted."

432 U.S. at 395-96 (emphasis added).

United Airlines was misinterpreted by the court below. Evidently fixated upon the idea that intervention must take place as early as possible, it dismissed *United Airlines* as "hold[ing] that class members are entitled to intervene even after judgment, in order to pursue an appeal, *if they do not learn until after judgment of the circumstance ... that calls for intervention*." App. 2a (emphasis added). With respect, this is plain wrong. It is true that in *United Airlines* this Court did note, in passing, that since the named plaintiffs had tried to take an interlocutory appeal of the denial of class certification, there had been no reason for McDonald to suppose they would not appeal after final judgment, and that she moved as soon as she learned to the contrary. 432 U.S. at 393-94. But these comments clearly formed no part of the rationale of the opinion; which, as noted *supra*, was based entirely on the fact that the motion was filed before the 30-day period of FRAP 3 had run against the appealable judgment. Rather, these comments were made in the context of whether the

defendant had been prejudiced by the delay and whether early intervention would have been unnecessarily cumbersome. 432 U.S. at 393 n.14, 394 n.15.[9]

The dissent in *United Airlines* drives home the teaching of that case and underscores the mistaken

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[9] We note that the last sentence of the reporter's syllabus in *United Airlines* is misleading: "Thus as soon as it became clear that the interests of the unnamed class members would no longer be protected by the named class representatives, and within the applicable appeal period, respondent moved to protect those interests." 432 U.S. at 386. A quick reading of this language, without study of the opinion itself, could seem to put at least as much emphasis on the time the appellant was aware that the named plaintiffs would not appeal as on the deadline for filing a notice of appeal. But "the headnote is not the work of the court, nor does it state its decision ... It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession in the examination of the reports. ... And finally, the headnote is a misinterpretation of the scope of the decision." *United States* v. *Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906).

Perhaps the analysis of the court below in the instant case was influenced by its own opinion in *United Airlines*. That opinion was based entirely on the concept that timeliness was measured from the time McDonald learned that the named plaintiffs would not appeal. *Romasanta* v. *United Airlines, Inc.*, 537 F.2d 915 (7th Cir. 1976). It referred to the 30-day appeal deadline only in passing, to point out that it had jurisdiction to consider not only the appeal from the refusal to permit intervention but also the appeal from the order refusing to certify the class. *Id.* at 919. Note that in affirming the judgment below in *United Airlines*, this Court merely said that the Seventh Circuit "was correct in ruling that the respondent's motion to intervene was timely filed and should have been granted," 432 U.S. at 395-96; it refrained from endorsing the Seventh Circuit's *reasoning* in support of its ruling.

interpretation by the court below. Without challenge from the majority, it stated flatly that "the Court apparently has ruled that a motion to intervene for the purpose of appealing the denial of class status is *timely under Rule 24 as a matter of law, so long as it is filed within the time period in which the named plaintiffs could have taken an appeal.*" 432 U.S. at 398 (emphasis added). As for reliance by McDonald on the class representatives to bring an appeal, the dissent considered that to be a "critical fact" only in that in its view such reliance had been misplaced because her claim had been time-barred (on the theory that the statute of limitations began running against her and the other unnamed class members once class certification had been denied). 432 U.S. at 399.

In the instant case, petitioners "acted promptly after the entry of final judgment" and "within the time period in which the named plaintiffs could have taken an appeal." 432 U.S. at 395-96. The judgment became final and appealable on May 3. App.11a. A notice of appeal — and, under *United Airlines*, a motion to intervene — filed any time before June 2 would thus have been timely. Petitioners filed their motion to intervene on May 4. It was thus "timely filed and should have been granted" under *United Airlines*. The decision of the court below thus "conflicts with [that] relevant decision[ ] of this Court." Rule 10(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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